STATE OF MICHIGAN

COURT OF APPEALS

REX VOELKER,

Plaintiff-Appellant,

v

SHARON VOELKER,

Defendant-Appellee.

UNPUBLISHED
August 30, 2002

No. 229642
Genesee Circuit Court
LC No. 99-210850-DM

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce entered on August 25, 2000. Specifically, plaintiff challenges the trial court's decision to treat a portion of his pension as marital property and award half of that portion to defendant. Plaintiff further contests the trial court's decision requiring him to pay a share of defendant's attorney fees. We affirm.

The parties were married on May 7, 1982. Plaintiff filed for divorce on February 18, 1999. During the divorce proceedings, plaintiff retired from his position as a firefighter. At the time of the March 21, 2000 hearing, plaintiff was receiving $5,190.92 per month, based on his election of a pension having a survivor benefit of fifty percent. Prior to the divorce proceedings, defendant worked primarily as a homemaker raising two children. The extent of defendant's work experience outside the home was limited to part-time employment. At the time of trial, defendant was employed as a helper with special needs children earning approximately $1,200 per month, based on a thirty-five hour weekly work schedule.

Plaintiff initially argues on appeal that the trial court clearly erred in determining that a portion of his pension should be considered marital property. Plaintiff further contests the method the trial court used to distribute plaintiff's pension. We disagree. This Court reviews a trial court's findings of fact in a divorce action for clear error. *McNamara v Horner*, 249 Mich App 177, 182; 642 NW2d 385 (2002). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the trial court's findings of fact are upheld, we must then determine whether the dispositive ruling was fair and equitable. *Id.*

The rights to vested pension benefits accrued by a party during the marriage are properly considered part of the marital estate subject to award upon divorce. MCL 552.18(1); *Vander Veen v Vander Veen*, 229 Mich App 108, 110-111; 580 NW2d 924 (1998).[1] Additionally, pension benefits accrued before or after the marriage may also be subject to property division. *Boonstra v Boonstra*, 209 Mich App 558, 562-563; 531 NW2d 777 (1995); *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992). "Pensions may be distributed through either the division of property or the award of alimony, depending on the equities and circumstances of the specific case." *Magee v Magee*, 218 Mich App 158, 164-165; 553 NW2d 363 (1996).

In the instant case, the trial court determined the portion of plaintiff's pension attributable to the marriage by dividing the number of years during the marriage in which defendant was earning his pension by the total years of service in which defendant earned his pension. Defendant was then awarded half of that amount. This resulted in a split of approximately two-thirds of plaintiff's monthly pension. We note that this specific method of apportionment was approved in *Vander Veen*, *supra*. Moreover, the trial court's decision to distribute the pension as alimony in gross was justified. The parties had few additional assets. The payroll and retirement coordinator for the city of Flint testified that she would only be allowed to withhold the money from plaintiff's pension check if it were categorized as alimony. See *Magee*, *supra* at 164-165. Specifically, the coordinator stated that "[t]he only thing that we can withhold per the ordinance from a retirement are Federal levies and Friend of the Court child support and alimony payments . . . ." Moreover, according to the coordinator an Eligible Domestic Relations Order (EDRO) was no longer an option because plaintiff already retired.

During the divorce proceedings, plaintiff named someone other than defendant as his beneficiary and elected to take a survivor benefit, thereby voluntarily reducing his monthly payment amount. Contrary to plaintiff's assertion on appeal, he was not ordered to pay defendant $840,702 out of a modest estate. Rather, plaintiff was ordered to either reinstate defendant as the designated surviving beneficiary of 32.4% of his pension, or obtain a life insurance policy on his life designating defendant as the beneficiary in this amount. In light of these facts, we find the trial court's order to be reasonable.

We also reject plaintiff's claim that the trial court failed to consider the equities of the case in awarding defendant half the marital portion of his pension. See *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992). A review of the trial court's ruling shows that it considered the following factors: (1) the parties fairly lengthy marriage; (2) the fact that, although defendant did not work during most of the marriage, she maintained the parties' home and raised two children; (3) the relative ages of the parties and their good health; (4) the disparity in the parties' income levels at the time of the divorce; (5) the fact that plaintiff had voluntarily retired early and could return to work, while defendant had a limited earning capacity for the

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[1] MCL 552.18 provides in pertinent part:

> (1) Any rights in and to vested pension, annuity, or retirement benefits, or accumulated contributions in any pension, annuity, or retirement system, payable to or on behalf of a party on account of service credit accrued by the party during marriage *shall* be considered part of the marital estate subject to award by the court under this chapter. [Emphasis added.]

foreseeable future; and (6) that fault was not a principal factor in the property division. A consideration of these factors provides ample support for the trial court's decision. *Id*. at 159-160. Accordingly, we affirm the trial court's decision to divide the marital portion of plaintiff's pension equally between the parties.

Plaintiff next argues that the trial court abused its discretion by awarding defendant attorney fees for expenses incurred during the divorce proceedings. We disagree. The trial court's decision to award attorney fees in a divorce proceeding is reviewed for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). An abuse of discretion will be found only where the result is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

Attorney fees may be awarded in a divorce action where a party has been forced to incur them as a result of the other party's unreasonable conduct during the course of the litigation. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). In this case, the trial court determined that plaintiff's unreasonable conduct unnecessarily delayed the proceedings and consequently awarded defendant attorney fees in the amount of $6,000. A review of the record supports this determination and we find no abuse of discretion.

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Jane E. Markey